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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Troy Terrell McNeal,
Plaintiff,

vs.

Florence Correctional Center, et al.,
Defendants.

No. CV 13-00325-PHX-DGC (JFM)

ORDER

On February 11, 2013, Plaintiff Troy Terrell McNeal, who is confined in the California Department of Corrections and Rehabilitation's Valley State Prison in Chowchilla, California, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of California. In a February 13, 2013 Order, United States Magistrate Judge Dennis L. Beck transferred the case to this Court because Plaintiff had filed the case in the wrong district.

In a June 10, 2013 Order, the Court noted that Plaintiff had not paid the \$350.00 civil action filing fee or filed an Application to Proceed *In Forma Pauperis*. The Court gave Plaintiff 30 days to either pay the filing fee or file a complete Application to Proceed.

On July 11, 2013, Plaintiff filed a Motion for Extension of Time and a Motion to Amend Civil Complaint. On August 15, 2013, Plaintiff filed an Application to Proceed *In Forma Pauperis*. In an October 4, 2013 Order, the Court granted the Motion for Extension of Time, the Motion to Amend, and the Application to Proceed, and dismissed

1 the Complaint because Plaintiff had failed to state a claim upon which relief could be
 2 granted. The Court gave Plaintiff 30 days to file an amended complaint that cured the
 3 deficiencies identified in the Order.

4 On November 12, 2013, Plaintiff filed a Petition for Extension of Time, which the
 5 Court granted in a November 20, 2013 Order. On December 9, 2013, Plaintiff filed his
 6 First Amended Complaint. In a December 31, 2013 Order, the Court dismissed the First
 7 Amended Complaint for failure to comply with Rule 8 of the Federal Rules of Civil
 8 Procedure. The Court gave Plaintiff 30 days to file a second amended complaint that
 9 cured the deficiencies identified in the Order.

10 On January 27, 2014, Plaintiff filed his Second Amended Complaint (Doc. 19).
 11 The Court will dismiss the Second Amended Complaint and this action.

12 **I. Statutory Screening of Prisoner Complaints**

13 The Court is required to screen complaints brought by prisoners seeking relief
 14 against a governmental entity or an officer or an employee of a governmental entity. 28
 15 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
 16 has raised claims that are legally frivolous or malicious, that fail to state a claim upon
 17 which relief may be granted, or that seek monetary relief from a defendant who is
 18 immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

19 A pleading must contain a “short and plain statement of the claim *showing* that the
 20 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8
 21 does not demand detailed factual allegations, “it demands more than an unadorned, the-
 22 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 23 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 24 conclusory statements, do not suffice.” *Id.*

25 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 26 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 27 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual
 28 content that allows the court to draw the reasonable inference that the defendant is liable

1 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible
2 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw
3 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s
4 specific factual allegations may be consistent with a constitutional claim, a court must
5 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*
6 at 681.

7 But as the United States Court of Appeals for the Ninth Circuit has instructed,
8 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,
9 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less
10 stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v.*
11 *Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

12 **II. Second Amended Complaint**

13 In his three-count Second Amended Complaint, Plaintiff sues the following
14 Defendants: Corrections Corporation of America (CCA), CCA’s Florence Correctional
15 Center (CCA-FCC), and Dentist Jane Doe.

16 In Count One, Plaintiff alleges that he was subjected to “[n]egligence under
17 deliberate indifference under Eight[h] Amendment” regarding his dental care. Plaintiff
18 asserts that he is a State of California inmate that was sent to CCA-FCC, received a
19 dental checkup at CCA-FCC, was advised that he needed dental work done, and
20 submitted a dental request because of his pain. Plaintiff claims that Defendant Doe filled
21 his teeth and told Plaintiff that pursuant to a contract with the California Department of
22 Corrections and Rehabilitation (CDCR), she was only permitted to fill, clean, or extract
23 teeth.

24 Plaintiff contends that he continued to have problems with the teeth Defendant
25 Doe had filled. Plaintiff asserts that Defendant Doe told Plaintiff that she would perform
26 three root canals and fit a silver cap on one tooth. Plaintiff states that after Defendant
27 Doe did the root canals, she attempted to fit the silver cap on his tooth, but it would not
28 fit. Therefore, Defendant Doe ground down an adjacent tooth, which allegedly caused

1 that tooth to weaken.

2 Plaintiff states that Defendant Doe told Plaintiff that he needed additional dental
3 work, she was not supposed to do that work under the CDCR contract, but if Plaintiff
4 submitted a request for a cleaning, she would finish the other root canals and caps and
5 bill federal agencies for the dental work. However, Plaintiff was returned to California,
6 where he eventually discovered that Defendant Doe did not do full root canals, leaving
7 part of the roots in Plaintiff's teeth.

8 Plaintiff alleges that, due to Defendant Doe's negligence, he had gum infections,
9 which ate away at his nasal cavity, and that part of his tooth broke off due to the grinding
10 Defendant Doe did. Plaintiff states that due to Defendant Doe's "ind[i]fference," he
11 needs extensive dental work to correct her mistakes, is in constant pain, has infections
12 "every-other week," needs additional dental work, and has "sinus bleeds" and a sinus
13 infection that is eating his nasal cavity.

14 In Count Two, Plaintiff alleges that he was subjected to cruel and unusual
15 punishment, in violation of the Eighth Amendment, regarding his dental care. He states
16 that Defendants Doe, CCA, and CCA-FCC unnecessarily inflicted pain and suffering on
17 him with "great disregard for the excessive risk to [Plaintiff's] health" because
18 Defendants CCA and CCA-FCC allowed Defendant Doe to perform, or should have
19 known that she would perform, procedures that were not part of the contract with the
20 CDCR or federal agencies, including partial root canals and tooth grinding. Plaintiff
21 asserts that Defendants CCA and CCA-FCC should have known about Defendant Doe's
22 fraudulent acts. Plaintiff alleges that Defendant Doe's negligence and fraudulent actions
23 were done for monetary gain and that they have affected Plaintiff's way of life and
24 imposed a future financial burden on him because he will need to pay for future medical
25 and dental work.

26 In Count Three, Plaintiff alleges that he was subjected to "[g]ross negligence/
27 medical malpractice/deliberate indifference for financial gain," in violation of the Eighth
28 Amendment. He asserts that Defendants Doe, CCA, and CCA-FCC were grossly

1 negligent in treating Plaintiff's needs because they "put profit ahead of [Plaintiff's]
2 medical and dental needs" when Defendant Doe performed three root canals, placed a
3 silver cap on a tooth, and ground down a tooth. Plaintiff claims Defendant Doe had no
4 regard for Plaintiff's medical and dental needs and that, by billing a federal agency for
5 dental work done on a state inmate, Plaintiff acted recklessly and for monetary gain.
6 Plaintiff asserts that Defendant Doe's actions have caused him pain and suffering and
7 future medical bills and that her dental work was "gross[ly] negligen[t], deliberate and
8 indifferen[t] to [Plaintiff's] needs."

9 Plaintiff seeks monetary damages.

10 **III. Failure to State a Claim**

11 Although *pro se* pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519,
12 520-21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey*
13 *v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a
14 liberal interpretation of a civil rights complaint may not supply essential elements of the
15 claim that were not initially pled. *Id.*

16 To state a valid claim under § 1983, plaintiffs must allege that they suffered a
17 specific injury as a result of specific conduct of a defendant and show an affirmative link
18 between the injury and the conduct of that defendant. *See Rizzo v. Goode*, 423 U.S. 362,
19 371-72, 377 (1976). There is no *respondeat superior* liability under § 1983, and
20 therefore, a defendant's position as the supervisor of persons who allegedly violated
21 Plaintiff's constitutional rights does not impose liability. *Monell v. New York City Dep't*
22 *of Soc. Servs.*, 436 U.S. 658, 691-92 (1978); *Hamilton v. Endell*, 981 F.2d 1062, 1067
23 (9th Cir. 1992); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "Because vicarious
24 liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each
25 Government-official defendant, through the official's own individual actions, has
26 violated the Constitution." *Iqbal*, 556 U.S. at 676. "A plaintiff must allege facts, not
27 simply conclusions, that show that an individual was personally involved in the
28 deprivation of his civil rights." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir.

1 1998). Conclusory allegations that a Defendant or group of Defendants has violated a
 2 constitutional right are insufficient.

3 **A. Defendant CCA**

4 To state a claim under § 1983 against a private entity performing a traditional
 5 public function, such as providing medical/dental care to prisoners, a plaintiff must allege
 6 facts to support that his constitutional rights were violated as a result of a policy,
 7 decision, or custom promulgated or endorsed by the private entity. *See Tsao v. Desert*
 8 *Palace, Inc.*, 698 F.3d 1128, 1138-39 (9th Cir. 2012); *Buckner v. Toro*, 116 F.3d 450, 452
 9 (11th Cir. 1997).

10 Plaintiff does not allege that Defendant CCA promulgated or endorsed a policy,
 11 decision, or custom that resulted in the alleged violation of Plaintiff's rights. Moreover,
 12 because there is no *respondeat superior* liability under § 1983, Defendant CCA is not
 13 liable simply because it employed individuals who allegedly violated Plaintiff's
 14 constitutional rights. Thus, Plaintiff has failed to state a claim against Defendant CCA,
 15 and the Court will dismiss Defendant CCA.

16 **B. Defendant CCA-FCC**

17 Section 1983 imposes liability on any "person" who violates an individual's
 18 federal rights while acting under color of state law. Defendant CCA-FCC is a building or
 19 collection of buildings, not a person or legally created entity capable of being sued.
 20 Therefore, the Court will dismiss Defendant CCA-FCC.

21 **C. Defendant Doe**

22 Not every claim by a prisoner relating to inadequate medical/dental treatment
 23 states a violation of the Eighth or Fourteenth Amendment. To state a § 1983 medical
 24 claim, a plaintiff must show that the defendants acted with "deliberate indifference to
 25 serious medical needs." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting
 26 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). A plaintiff must show (1) a "serious
 27 medical need" by demonstrating that failure to treat the condition could result in further
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1 significant injury or the unnecessary and wanton infliction of pain and (2) the defendant's
2 response was deliberately indifferent. *Jett*, 439 F.3d at 1096 (quotations omitted).

3 "Deliberate indifference is a high legal standard." *Toguchi v. Chung*, 391 F.3d
4 1051, 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must
5 both know of and disregard an excessive risk to inmate health; "the official must both be
6 aware of facts from which the inference could be drawn that a substantial risk of serious
7 harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825,
8 837 (1994). Deliberate indifference in the medical context may be shown by a
9 purposeful act or failure to respond to a prisoner's pain or possible medical need and
10 harm caused by the indifference. *Jett*, 439 F.3d at 1096. Deliberate indifference may
11 also be shown when a prison official intentionally denies, delays, or interferes with
12 medical treatment or by the way prison doctors respond to the prisoner's medical needs.
13 *Estelle*, 429 U.S. at 104-05; *Jett*, 439 F.3d at 1096.

14 Deliberate indifference is a higher standard than negligence or lack of ordinary
15 due care for the prisoner's safety. *Farmer*, 511 U.S. at 835. "Neither negligence nor
16 gross negligence will constitute deliberate indifference." *Clement v. California Dep't of*
17 *Corrections*, 220 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); *see also Broughton v. Cutter*
18 *Labs.*, 622 F.2d 458, 460 (9th Cir. 1980) (mere claims of "indifference," "negligence," or
19 "medical malpractice" do not support a claim under § 1983). "A difference of opinion
20 does not amount to deliberate indifference to [a plaintiff's] serious medical needs."
21 *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). A mere delay in medical care,
22 without more, is insufficient to state a claim against prison officials for deliberate
23 indifference. *See Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407
24 (9th Cir. 1985). The indifference must be substantial. The action must rise to a level of
25 "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 105.

26 At most, Defendant Doe may have provided treatment in excess of her contract
27 with the CDCR and may have acted negligently or committed medical malpractice. None
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1 of this, however, rises to the level of deliberate indifference and Plaintiff's allegations do
2 not support a deliberate indifference claim. Thus, the Court will dismiss Defendant Doe.

3 **IV. Dismissal without Leave to Amend**

4 Because Plaintiff has failed to state a claim in his Second Amended Complaint, the
5 Court will dismiss his Second Amended Complaint. "Leave to amend need not be given
6 if a complaint, as amended, is subject to dismissal." *Moore v. Kayport Package Express,*
7 *Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). The Court's discretion to deny leave to amend is
8 particularly broad where Plaintiff has previously been permitted to amend his complaint.
9 *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996).
10 Repeated failure to cure deficiencies is one of the factors to be considered in deciding
11 whether justice requires granting leave to amend. *Moore*, 885 F.2d at 538.

12 Plaintiff has made three efforts at crafting a viable complaint and appears unable
13 to do so despite specific instructions from the Court. The Court finds that further
14 opportunities to amend would be futile. Therefore, the Court, in its discretion, will
15 dismiss Plaintiff's Second Amended Complaint without leave to amend.

16 **IT IS ORDERED:**

17 (1) Plaintiff's Second Amended Complaint (Doc. 19) and this action are
18 **dismissed** for failure to state a claim, and the Clerk of Court must enter judgment
19 accordingly.

20 (2) The Clerk of Court must make an entry on the docket stating that the
21 dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).

22 (3) The docket shall reflect that the Court certifies, pursuant to 28 U.S.C.
23 § 1915(a)(3) and Federal Rules of Appellate Procedure 24(a)(3)(A), that any appeal of
24 this decision would not be taken in good faith.

25 Dated this 7th day of May, 2014.

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David G. Campbell
United States District Judge